

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN DAVID STOCKMAN,

Defendant-Appellant.

UNPUBLISHED

March 22, 2005

No. 251711

Wayne Circuit Court

LC No. 03-007369-01

Before: Owens, P.J., and Sawyer and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC I) with a person under thirteen years of age, MCL 750.520b(1)(a), and one count of accosting a child for immoral purposes, MCL 750.145a. Defendant was sentenced to eighteen to fifty years in prison for the CSC I convictions, and a concurrent term of one to four years in prison for the accosting a child for immoral purposes conviction. We affirm.

I

Defendant first asserts that the prosecution's comments in closing argument violated his Fifth Amendment right to remain silent. We disagree.

The prosecutor's comments, while resting on the thinnest of testimony, clearly referred to defendant's conduct at the complainant's grandmother's house when defendant's friends confronted the grandmother with the complainant's allegations, believing them to be untrue. The comments in no way referred to defendant's failure to take the stand, and could not have reasonably been understood as doing so. Thus, we find no Fifth Amendment violation.

II

Defendant next asserts that other acts evidence was admitted at trial for an improper purpose, and that he was denied the effective assistance of counsel by counsel's failure to object on the correct grounds. We disagree.

Defendant failed to object at trial to the challenged evidence. The standard of review for unpreserved issues is plain error affecting substantial rights. To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain,

i.e., clear or obvious, and 3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant, or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Carines, supra* at 763-764.

MRE 404(b) governs the admission of other acts evidence, and provides as follows:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), other acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose other than to establish the defendant's character or propensity to commit the offense, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998).

Defendant contends that a witness' testimony regarding drug use in the residence where the sexual abuse took place was not offered for any proper purpose and should not have been admitted. Even assuming that the testimony should have been excluded, we are satisfied that the testimony did not affect the outcome of the trial. *Carines, supra*. In light of the brief and general nature of the testimony concerning drug use, and the fact that it involved most of the witnesses, including the grandmother, we conclude that the testimony in this regard was harmless. Because any error qualifies as harmless, we also reject defendant's contention that defense counsel's objection on incorrect grounds denied him the effective assistance of counsel. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (explaining that the defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different).

III

Defendant next asserts that his Sixth Amendment right to confront witnesses against him was violated when the court simply determined the child witness' competency and failed to administer an oath or secure a promise to tell the truth. We disagree.

While defendant attempted to challenge the complainant's competency as a witness by asking questions on voir dire, defendant did not object to the court's failure to administer an oath or obtain a promise to tell the truth. The court determined that the witness was competent after the witness demonstrated that she knew the difference between the truth and a lie, and that she understood that it is good to tell the truth and bad to lie. While the court should have gone on to

ascertain that the witness understood that she had to tell the truth in court, we conclude that the obligation was sufficiently inherent in the circumstances.

IV

Defendant next asserts that his due process rights were violated when the prosecution failed to supply the defense with a video tape of the “Kids Talk” forensic interview and child protective services file before trial. We disagree.

Defendant presents no support for a finding that these items were intentionally withheld, that they were exculpatory, or that defendant was in any way prejudiced by the failure to produce them. We find no basis for reversal.

V

Defendant next asserts that the prosecution failed to present sufficient evidence to sustain his convictions. We disagree.

This Court reviews de novo claims of insufficient evidence to determine whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the prosecution proved all of the essential elements of the crime beyond a reasonable doubt. *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

In order to prove a defendant guilty of CSC I with a person under the age of thirteen, the prosecutor must prove that defendant: 1) engaged in sexual penetration with another person, 2) who is under thirteen years of age. *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995). “Sexual penetration” means “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body.” MCL 750.520a(o).

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to support defendant's convictions. The complainant's testimony established that defendant “got the thing” that is used for “[p]ut[ting] gravy on the chicken” and put it “up here,” indicating her genital area. She described the area as the part she used when “[u]sing the bathroom,” and the part “where pee comes out.” In addition, defendant told the complainant that he had inserted the item “where pee comes out.” The complainant felt the “gravy thing” inside her “like it was in [her] stomach.” She indicated that it hurt when defendant placed the “gravy thing” inside her. This testimony was sufficient to establish the element of penetration.

Sufficient evidence also established that defendant penetrated the complainant through cunnilingus. An act of cunnilingus, by definition, involves an act of sexual penetration. MCL 750.520a(o); *People v Legg*, 197 Mich App 131, 132-133; 494 NW2d 797 (1992). Cunnilingus requires the placing of the mouth of a person upon the external genital organs of the female that lie between the labia, the labia itself, or the mons pubes. *Id.* In *Legg*, this Court found sufficient evidence of penetration where the complainant testified that the defendant touched “(t)he part (of her body) that [she] go[es] to the bathroom with” with his mouth. *Id.* at 133. The Court held that the defendant's touching with his mouth of the urethral opening, vaginal opening, or labia

established cunnilingus. Similarly, in the instant case, the complainant testified that defendant “licked” her “[r]ight here,” indicating her genital area, while they were on the bed. Similar to the complainant in *Legg*, the complainant indicated that defendant licked her “where your pee comes out.” Thus, the evidence supported defendant’s CSC I conviction involving cunnilingus.

With respect to defendant’s conviction of accosting a child for immoral purposes, any “person who accosts, entices, or solicits a child less than 16 years of age with the intent to induce or force that child . . . to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or any other act of depravity or delinquency,” or shall suggest to such child any of those acts is guilty of a felony. MCL 750.145a; *People v Meyers*, 250 Mich App 637, 639; 649 NW2d 123 (2002). Defendant contends that complainant’s testimony was not specific enough to warrant conviction. Viewing the evidence in the light most favorable to the prosecution, the complainant testified that while they were in the living room, defendant pushed her down on the couch and took off his pants and his “panties”. He then instructed the complainant to “get on,” but she did not know what he was talking about. This evidence sufficed to prove the essential elements of accosting a child for immoral purposes.

VI

Defendant also contends that the trial court abused its discretion when it departed from the sentencing guidelines based on reasons that were already taken into account by the guidelines, and on the basis of facts that were neither found by the jury nor admitted by defendant. We disagree.

In reviewing a trial court’s sentence departure, this Court applies three standards of review. We review for clear error the trial court’s finding that a relevant sentencing factor exists, de novo the question whether a factor is objective and verifiable, and for an abuse of discretion the trial court’s finding that an objective and verifiable factor amounts to a substantial and compelling reason to depart from sentencing guidelines. *People v Babcock*, 469 Mich 247, 273-274; 666 NW2d 231 (2003). Under Michigan’s legislative sentencing guidelines, a trial court may depart from the guidelines only if it has substantial and compelling reasons to do so, and states those reasons on the record. MCL 769.34(3); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The court’s stated reasons for departure must be objective and verifiable, meaning that they must be actions or occurrences external to the minds of the judge, defendant and others involved in making the decision, and capable of being confirmed. *Id.* A court may not “base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range, unless the court finds from the facts contained in the court record, including the presentence report, that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b).

Defendant’s amended sentencing information report (SIR) placed him in the C-III cell for a class A offense, with a minimum sentencing guidelines range of 81 to 135 months. The trial court sentenced him to eighteen to fifty years in prison for the CSC I convictions and gave the following reasons for its 6-3/4-year upward departure:

According to complainant, . . . a six year old victim, the defendant took her to several rooms prior to his encounter where he systematically used his position as an adult to keep her in a room and inserted a turkey baster into her vagina. He

then invited her to get on this, referring to his penis. He then told her not to tell her grandmother when she returned to the home. Although the defendant has been scored ten points for predatory conduct, which has been defined as pre-offense conduct directed at a victim for the primary purpose of victimization. This variable give [sic] inadequate and disproportionate weight to he [sic] pain and humiliation and brutality of the offending contact—conduct of inserting a turkey baster into a six year olds [sic] vagina. Moreover, defendant told her to “Get on this,” referring to his penis.

The testimony of Mr. Stockman’s ex-girlfriend, Starla Carmier, and the victim’s grandmother, Joyce Baldwin, and Mark Stabler, an acquaintance, indicated that the defendant had a crack cocaine problem during the time of the offense. The defendant further provided information in a presentence report that [sic] had a substance abuse problem since the age of sixteen. There’s been an increase in abuse from alcohol to crack cocaine in a twenty year period. This is indicative of a lack of reformation the defendant could obtain based on the current guidelines. Moreover, the defendant continued to exploit the defendant [sic] by going to the grandmother’s house after the incident with Start Cramier [sic], Mark Stabler, and other individuals who separated the grandmother from the victim for the purpose of intimidating the victim and her grandmother.

Defendant contends that the trial court’s reasons for its upward departure were neither objective and verifiable nor otherwise substantial and compelling. Defendant argues that his “systematic” use of his position as an adult was already accounted for under OV 10, and that complainant’s “pain and humiliation” was already accounted for under OV 4.

The trial court found that the points scored in the SIR for predatory conduct gave “inadequate” and “disproportionate” weight to the pain and humiliation the complainant suffered from having a turkey baster inserted into her vagina. The trial court also cited defendant’s substance abuse problem dating back to the age of sixteen and his attempt to intimidate the complainant and her grandmother when he returned to the home after the incident.

Defendant contends that the fact that he allegedly returned to the home to intimidate the complainant and her grandmother was ruled inadmissible and not placed before the jury at trial, and the court thus relied on facts outside of the trial record to determine the sentence. Defendant’s argument ignores that the trial court has discretion to consider a broad range of evidence when imposing a sentence, including facts inadmissible during the defendant’s trial. *People v Adams*, 430 Mich 679, 686; 425 NW2d 437 (1988); *People v Beard*, 171 Mich App 538, 548; 431 NW2d 232 (1988).

Even assuming that the trial court improperly took into account the intimidation evidence, remand for resentencing would not be required. If the trial court articulates multiple substantial and compelling reasons to justify a departure from the guidelines, and this Court determines that some of these reasons are substantial and compelling and some are not, the panel must determine the trial court’s intentions, specifically whether the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone. *Babcock, supra* at 260. The trial court’s central rationale for the upward departure was the repeated abuse of authority and victimization behavior engaged in by

defendant, which is substantial and compelling in the trial record. Therefore, defendant's contention regarding the trial court's reliance on facts not placed on the record is without merit.

Defendant also contends that the United States Supreme Court decision in *Blakely v Washington*, 542 US ____; 124 S Ct 2531; 159 L Ed 2d 403 (2004), regarding sentencing guideline departures controls, and that, contrary to this decision, the trial court's upward departure from the guidelines was not proven beyond a reasonable doubt or admitted by defendant. However, in *People v Claypool*, 470 Mich 715; 684 NW2d 278 (2004), the Michigan Supreme Court held that the Michigan sentencing guidelines system was unaffected by the holding in *Blakely* because the scheme in *Blakely* was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment. *Id.* at 730-731 n 14 (opinion by Taylor, J.), 738-740 (opinion by Corrigan, C.J., concurring in part and dissenting in part), 741 (opinion by Cavanagh, J., concurring in part and dissenting in part), 744 (opinion by Weaver, J., dissenting in part and concurring in part), 744 n 1 (opinion by Young, J., concurring in part and dissenting in part). The Court found, in contrast to the scheme in *Blakely*, that Michigan has an indeterminate sentencing system in which the defendant is given a sentence with a minimum and a maximum and that maximum is not determined by the trial judge but is set by law. *Id.*

VII

Defendant lastly argues that his substantial rights were affected by the trial court's failure to orally state the sentence to be imposed for accosting a child for immoral purposes, or the reason for that sentence, although the sentence later appeared on the judgment of sentence.

A trial court is required to state on the record the sentence being imposed, including the minimum and maximum sentence. MCR 6.425(D)(2)(d). To facilitate appellate review, the sentencing court must articulate on the record the criteria considered and the reasons supporting its decision regarding the sentence imposed. *People v Terry*, 224 Mich App 447, 455-456; 569 NW2d 641 (1997). Failure to articulate the reasons for sentencing requires remand for a statement of the reasons sentence was imposed. *People v Triplett*, 432 Mich 568, 573; 442 NW2d 622 (1989).

At the sentencing hearing, the trial court failed to either state the sentence or articulate any basis for the sentence. This was clear error. However, given that the judgment of sentence makes clear what sentence the court intended, and the sentence runs concurrent to the much longer sentence for CSC I, we perceive no need for remand.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Helene N. White